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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR
v. Jean-Pierre Bemba Gombo**

Public

**Public Redacted Version of Urgent Defence Motion concerning “Information on
[REDACTED] 169 and 178 with [REDACTED]”**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

A. BACKGROUND

1. The chronology of events relevant to the instant applications, as known to the Defence, is as follows.

2. In **February 2011**, during the testimony of CAR-OTP-PPPP-0073, Trial Chamber III (“the Chamber”) heard that a certain “[REDACTED]”, representing himself as an official of the International Criminal Court (“ICC”), was complicit in falsifying victims’ application forms in the *Bemba* proceedings.¹

3. In **July and August 2011**, the Chamber heard the testimony of Prosecution Witnesses CAR-OTP-PPPP-0169 (“Witness 169”) and CAR-OTP-PPPP-0178 (“Witness 178”), who were presented by the Prosecution as witnesses who would give testimony adverse to the accused.

4. On **21 October 2011**, [REDACTED]:²

[REDACTED]

5. On **14 August 2012**, the Defence began presenting its witnesses. The Prosecution has to date systematically questioned each and every Defence witness about any receipt or promise of payment or other benefit in exchange for their testimony. Following a Defence objection on 28 November 2012, the Prosecution Senior Trial Attorney asserted:

[REDACTED]

¹ICC-01/05-01/08-T-73-Red-ENG WT 24-02-2011, pp.19-25.

²ICC-01/05-01/08-1857-Conf, para. 14.

The Defence objection was overruled on the basis that such questions were relevant to the credibility of the witness.³

6. According to information recently received by the Defence, it appears that in **March 2013**, Witness 178 [REDACTED], at which the prospect that witnesses would receive payments for compensation of loss of earnings was discussed.⁴

7. On **19 April 2013**, a meeting was apparently held between Witness 169, the Prosecution, and the Victims and Witnesses Unit (“VWU”). At this meeting, the participants discussed the payment to the witness of a number of fees and allowances.⁵

8. On **6 June 2013**, a meeting was held between Witness 169 and VWU, at which VWU apparently agreed to pay certain sums of money to the witness.⁶

9. On **7 June 2013**, Witness 169 wrote to the Prosecutor of the ICC, with copies for information to the [REDACTED]. In this letter, he listed the [REDACTED]. In this letter Witness 169 identified himself both by his name and as ‘Témoign No. 169 à la cour’.⁷ No disclosure was made to the Defence, despite the letter making explicit reference to “l’argent promis par le procureur pour les témoins.” The Defence observes that the [REDACTED] amounts effectively to the entire list of [REDACTED] called by the Prosecution as part of its case.

10. On **8 June 2013**, Witness 169 wrote a second letter, this time to VWU, but with copies for information to the all the same addressees as before, in which he appeared to be complaining about a [REDACTED] with VWU on the previous day.⁸ Self-evidently from the contents of Annexes A and B, the Prosecution did receive a copy of the 8 June 2013 letter as a party copied into the correspondence. Again, no disclosure was made to the Defence of the letter, the actions of this witness in [REDACTED], nor his demands for benefits and/or payments.

³ICC-01/05-01/08-T-277-CONF-ENG-ET, 28-11-2012, pp.35-37.

⁴ICC-01/05-01/08-2827-Conf-Red, para.15.

⁵ICC-01/05-01/08-2827-Conf-Red-AnxA.

⁶ICC-01/05-01/08-2827-Conf-Red-AnxB.

⁷ICC-01/05-01/08-2827-Conf-Red-AnxA.

⁸ICC-01/05-01/08-2827-Conf-Red-AnxB.

11. On **11 June 2013**, VWU confirmed to the Prosecution that they were aware of the situation.⁹

12. On **18 June 2013** the Prosecution contacted “several [REDACTED]. *Inter alia*, Witness 42 apparently told the prosecution [REDACTED].¹⁰

13. On **25 June 2013**, the Prosecution contacted Witness 169 and Witness 178 by telephone. The Prosecution was informed, *inter alia*, that they had [REDACTED].¹¹

14. Between **25 June 2013** and **3 October 2013**, from the information available to the Defence, nothing was apparently done for 100 days. No attempt was made to retrieve [REDACTED] from the apparent recipients, nor to determine whether the letters had in fact been received, nor to contact any of the [REDACTED] to discover their position, nor to resolve the grievances of Witness 169 and Witness 178. Significantly, the Prosecution did not disclose the witness’ demands for payments and/or benefits during this period of **over three months**. Given its ongoing in-court practice of cross-examining Defence witnesses about their anticipated benefits from testifying, and its certain knowledge of the law of the ICC and the practice of Trial Chamber III in relation to such matters, it is inconceivable that the Prosecution genuinely believed that it “[did] not form the basis of a disclosure requirement as per Article 67(2)”.

15. On **16 July 2013**, the Chamber ordered that the presentation of evidence by the Defence be concluded by 25 October 2013 at the latest.¹²

16. On **3 October 2013**, the Prosecution informed the Chamber, in an *ex parte* filing, of the actions of Witnesses 169 and 178. This filing was made **four months** after it appears the Prosecution was first made aware of the situation.

17. Over a month later, on **5 November 2013**, 10 days prior to the close of the Defence case,¹³ the Chamber rendered the *Confidential redacted version of “Decision on the*

⁹ICC-01/05-01/08-2827-Conf-Red, para. 11.

¹⁰ ICC-01/05-01/08-2827-Conf-Red, para. 13

¹¹ICC-01/05-01/08-2827-Conf-Red, para. 13. [REDACTED]

¹²ICC-01/05-01/08-2731, para. 38.

¹³ICC-01/05-01/08-2861.

*prosecution's 'Information on [REDACTED]' (ICC-01/05-01/08-2827-Conf-Exp) of 25 October 2013 ("Chamber's Decision")*¹⁴. This was the first notice to the Defence of these significant irregularities. The Chamber held:

In the case at hand, the Chamber notes that the Prosecution Submissions refer to allegations made by Witness 169 as to "outstanding claims" and "money promised by the Prosecutor for witnesses". In the view of the Chamber, any information relating to such claims may be "material for the preparation of the defence" and therefore should be disclosed under Rule 77 of the Rules.

18. On **7 November 2013**, the Prosecution filed *its Confidential redacted version of Information [REDACTED]*¹⁵ ("Prosecution Submissions"). This filing provided fuller details to the Defence of the extent of the conduct in question.

19. On **8 November 2013**, the Prosecution filed its *Report pursuant to Chamber's decision on the Prosecution's information [REDACTED]*, ("Prosecution Report")¹⁶ in which it stated it was prepared to "increase its measures" to deal with the situation created by the conduct of the two witnesses in question.¹⁷ This Report indicates that the Prosecution had not in fact contacted each of the [REDACTED].¹⁸

B. CONFIDENTIAL AND URGENT NATURE OF THE PRESENT FILING

20. The Prosecution Submissions, Prosecution Report and Chamber's Decision have all been filed confidentially. Given that the present motion refers to these filings at length, it is also classified by the Defence as confidential. However, with appropriate redactions, the Defence submits that the majority of information contained in the Prosecution Submissions, Prosecution Report and Chamber's Decision could and should be made public without any adverse impact on the security of witnesses, or the risk of revealing the identities of any of the individuals concerned, be they witnesses or ICC field staff. Given the significance of the material contained in these filings, the Defence accordingly seizes the Chamber with a request to order that public versions of all relevant documents be made available as a matter of urgency.

¹⁴ICC-01/05-01/08-2845-Conf-Red.

¹⁵ICC-01/05-01/08-2827-Conf

¹⁶ICC-01/05-01/08-2867-Conf

¹⁷ICC-01/05-01/08-2867-Conf, para. 3.

¹⁸ICC-01/05-01/08-2867-Conf, para. 11.

21. The Defence also notes the late stage of the proceedings, and the fact that the Defence has been ordered to conclude the presentation of its evidence in the coming days. Given the significance of the information contained in the Prosecution Submissions, discussed further below, the Defence respectfully requests that the relief sought in the present motion be dealt with on an expedited basis, in order not to further delay the completion of the proceedings.

C. APPLICABLE LAW

(a) The Prosecution's obligation to disclose benefits or requests for benefits from its witnesses

22. The Prosecution's obligation to disclose benefits and payments provided to its witnesses has been a longstanding feature of the international criminal tribunals.¹⁹ This obligation was explicitly recognized at the ICC in *Lubanga* in May 2010.²⁰ In the *Bemba* case, the Chamber set out this obligation in clear terms in October 2011. The Chamber summarized the Prosecution's legal obligation as follows:²¹

[REDACTED]

(b) The Prosecution's ongoing disclosure obligations

23. The disclosure obligations incumbent on the Prosecution under Article 67(2) and Rule 77 are **ongoing**. The completion of a Prosecution witness' testimony does not relieve

¹⁹ ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Trial Chamber I, Judgement, 12 June 2007, paras. 36 to 38; ICTR, *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-PT, Trial Chamber III, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 7; See also ICTR, *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza*, Case No. ICTR-99-50-T, Trial Chamber II, Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, para. 13; ICTR, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Trial Chamber III, Décision relative aux Requêtes déposées par la Défense et par le Procureur concernant le témoin ADE, 31 January 2006, paras. 20 and 23; SCSL, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Trial Chamber II, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010, paras. 21 to 22.

²⁰ Trial Chamber I, Transcript of hearing on 25 May 2010, ICC-01/04-01/06-T-294-ENG CT WT, page 28, lines 1 to 10.

²¹ ICC-01/05-01/08-1857-Conf, paras. 9-12 (footnotes omitted).

the Prosecution of disclosing material that “may affect the relevance of prosecution evidence” or that is “material to the preparation of the Defence”.²² The Chamber has previously held that:²³

With regard to disclosure of Article 67(2) items and Rule 77 material, the Chamber recalls its "Decision on defence disclosure and related issues". The Chamber hereby reiterates that the prosecution has been instructed that, as an **ongoing** obligation during the trial proceedings, it shall disclose any Article 67(2) items or permit the defence to inspect any Rule 77 material in its possession or control, promptly upon their identification, throughout the presentation of evidence by the defence.

(c) Recall of Witnesses

24. While not explicitly provided for in the Rules of Procedure and Evidence, recall of witnesses is a remedy available to accused appearing before the ICC. Witnesses have previously been recalled in both the *Lubanga* and *Katanga & Ngudjolo* cases when circumstances following the completion of their testimony gave rise to the need for further questioning. The Chamber in the present proceedings has also explicitly contemplated the possibility of recall in certain circumstances:²⁴

If, after Witnesses 15, 36, 44 and 45 have testified, the defence believes that good cause exists for Witness 219 to be questioned further, the Chamber will consider any substantiated request from the defence to recall Witness 219.

25. Significantly, the Chamber limited the recall of witnesses to situations where material could not have been obtained through the exercise of reasonable diligence **prior** to the witness’ testimony.²⁵

^{26.} In *Lubanga*, a witness was recalled for further questioning by the Defence after post-testimony disclosure warranted further questioning.²⁶ On another occasion, the Presiding Judge was explicit that documents made available after two witnesses had completed their evidence “raise issues of sufficient substance as to justify the recall of both witnesses so that

²²ICC-01/05-01/08-2845, paras. 9-10.

²³ICC-01/05-01/08-2292, paras.9-10 (emphasis added and footnotes omitted).

²⁴ICC-01/05-01/08-1974, para. 20.

²⁵ICC-01/05-01/08-1594-Red, para. 25.

²⁶ ICC/01/04-01/06-T-317-Red2-ENG-WT, 25-10-2010 38/73 NB T.

[Defence Counsel] can explore, in much the same way as she has just done with the last witness at the conclusion of her questioning, the issues that self-evidently arise from them.”²⁷ Similarly in *Katanga* the Presiding Judge held that the Defence was able to apply in writing if, upon investigation of new facts raised during the examination in chief of a prosecution witness, there was a need for witnesses to be recalled.²⁸

27. It is also evident that the Chamber itself has the power to order recall of witnesses, pursuant to Article 69(3) of the Rome Statute. Significantly, in *Lubanga*, Trial Chamber I recalled a witness because statements made by the witness after the completion of his testimony created doubt as to whether or not the witness had given truthful testimony.²⁹ Similarly in *Katanga & Ngudjolo*, Trial Chamber II recalled a witness pursuant to Article 69(3) in order to safeguard the rights of the accused, after “having considered its duty to ensure that the accused's rights are not unduly prejudiced.”³⁰

28. Recall of witnesses was not an uncommon remedy at the international criminal tribunals. Trial Chambers at the ICTR required that the party seeking to recall a witness demonstrated good cause. Assessing good cause required the fulfilment of a two-pronged test: “(1) considering the purpose for which the witness will testify; and (2) the reasons why the witness was not questioned earlier on those matters.”³¹ A similar test was applied at the ICTY, with the Trial Chamber in *Gotovina* ruling as follows:³²

In determining whether there are sufficient grounds to recall a witness, the Chamber needs to consider whether the requesting party has demonstrated good cause to recall the witness. In assessing a good cause, a Chamber shall consider the purpose for recalling the witness as well as the applicant's justification for not eliciting the relevant evidence from the witness when he originally testified.

D. SUBMISSIONS

²⁷ICC-01/04-01/06-T-234-Red-ENG-WT, 25-01-2010 13/19 NB T.

²⁸ ICC-01/04-01/07-T-112-Red-FRA-WT, 04-03-2010 5/76.

²⁹ICC-01/04-01/06-T-134-Red-ENG-WT, 24-02-2009 80/90 EA T.

³⁰ICC-01/04-01/07-2325-Red, para. 26.

³¹*Prosecutor v. Nzabonimana*, ICTR-98-44D-T, 25 June 2010, para. 11; See also *Prosecutor v. Karemera et al.*, ICTR-98-44-T, 23 July 2009, para.3; *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, paras. 6-7.

³²*Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Prosecution Motion to Recall Mark Rajčić, 24 April 2009, para. 10.

(a) The redactions in the Prosecution Submissions go beyond that authorised by the Chamber

29. By way of preliminary observations, the Defence would highlight the facts, firstly, that the current filing by the Prosecution is confidential and not public, and, secondly, that many of the personal details of witnesses contained in the filing and its annexes are already known to the parties and participants through the evidence they have given in the case. The Chamber has repeatedly underlined the duty of confidentiality to which all counsel and staff are subject, and it is submitted that at this stage, over and above the deletion of a witness' precise current location or address, no redaction is justified from a confidential *inter partes* filing.

30. Indeed, the Chamber's Decision, on the redaction of materials is explicit:³³

[REDACTED]

31. Notwithstanding that, the Prosecution has applied copious redactions to the filing and annexes, effectively editing them as if they were for public consumption, rather than for disclosure to the lawyers in the case. For example, the letter of 7 June 2013³⁴ has redacted from it a substantial and potentially significant paragraph at the bottom of the first page without which the full content of the letter is impossible to discern. The author of the letter is known. As such, it is difficult to see how such a paragraph could relate in its entirety to his current contact details, or that, in the event that there was some reference, it could not be more surgically excised.

32. The letter of 8 June 2013³⁵ has redacted from it a paragraph with 10 numbered bullet points under the heading "Caracteristiques". It is difficult to see how these refer to the current or past places of residence of the witness, contact details, or the identities or location of court staff. Moreover, the identity of the author of the letter is known, as is his trade or profession from the evidence he gave at trial. The claims he makes, however, or the reason why he is entitled in 2013 to extraordinary levels of compensation, are quintessentially

³³ICC-01/05-01/08-2845-Conf-Red, para. 12.

³⁴ICC-01/05-01/08-2827-Conf-Red-AnxA.

³⁵ICC-01/05-01/08-2827-Conf-Red-AnxB.

relevant to his credibility. The Defence also questions the redaction of the “Objet” of the letter, given the strict parameters for redactions set by the Chamber.

33. The redaction from both the emails of 7 and 10 June 2013³⁶ of the sender and some of the recipients is both illogical and outside the Chamber’s order. The body of the filing discloses that Witness 169 is the sender of the email, and footnote 3 discloses that none of the recipients are either a witness or an ICC field staff member. Moreover, other recipients, including ICC staff members, are unredacted.

34. In the body of the Prosecution Submissions, the nationality of “[REDACTED]” has been redacted. This individual is not the beneficiary of witness protective measures. As noted above, the name “[REDACTED]” is known to the Chamber and the parties as someone who allegedly encouraged and facilitated the fabrication of victims’ application forms in the *Bemba* case.³⁷ No suggestion was made during the questioning of Witness CAR-OTP-PPPP-0173 that the nationality of “[REDACTED]” was protected information that should not be disclosed to the Defence. As such, redacting this information at this stage is illogical, particularly given its potential relevance.

35. As such, the Defence requests that the Chamber order the Prosecution to provide a version of the Prosecution Submission that complies with the order on redactions as set out in paragraph 12 of the Chamber’s Decision. Once this lesser redacted version has been prepared, the Defence requests that the Prosecution attribute an ERN number and formally disclose both Annex A and Annex B to the Prosecution Submissions,³⁸ given their significance to the credibility of the witnesses in question.

(b) Disclosure of benefits and payments to Prosecution witnesses

36. As recognised by the Chamber³⁹ and outlined above, [REDACTED].

³⁶ICC-01/05-01/08-2827-Conf-Red-AnxA, ICC-01/05-01/08-2827-Conf-Red-AnxB.

³⁷ICC-01/05-01/08-T-73-Red-ENG-WT, 24-02-2011, pp.19-25.

³⁸ICC-01/05-01/08-2827-Conf-Red-AnxA, ICC-01/05-01/08-2827-Conf-Red-AnxB.

³⁹ICC-01/05-01/08-1857-Conf, paras. 9-12.

37. In the Prosecution Submissions, however, the Prosecution states that it considered that the information contained in its submissions and the attached Annex A “does not form the basis of a disclosure requirement as per Article 67(2) of the Statute.”⁴⁰

38. Given the Prosecution’s stated position, and given that the Chamber has again clarified the Prosecution’s clear obligation to do so, the Defence accordingly requests that the Chamber order disclosure of any **requests** for payments or other benefits made by Witness 169, Witness 178, [REDACTED], and all **details and dates of the payments** or benefits provided to Witness 169, Witness 178, [REDACTED] by the Prosecution, VWU or the Registry, including those made in the period between 25 June 2013 and 3 October 2013.

(c) Disclosure of material generated from contact with Witness 169, Witness 178 and the [REDACTED]

39. On 25 June 2013, the Prosecution “placed separate telephone calls to Witness 169 and Witness 178 to discuss with them the information received, brief them on potential offences under Article 70 of the Statute and instruct them to desist from [REDACTED]”⁴¹

40. In addition, the Prosecution contacted [REDACTED].⁴² The Prosecution Submissions appear to indicate that this contact was limited to four witnesses; Witness 119, Witness 42, Witness 38, and Witness 68.⁴³ The Prosecution Report specifically refers to [REDACTED], with the Prosecution undertaking to use [REDACTED] to attempt to establish communication with [REDACTED].⁴⁴

41. As noted above, the Prosecution’s obligation to disclose exculpatory material and information “material for the preparation of the defence” is ongoing. Simply because a witness has completed his testimony before the Chamber does not relieve the Prosecution of

⁴⁰ICC-01/05-01/08-2827-Conf-Red, para.20.

⁴¹ICC-01/05-01/08-2827-Conf-Red, para. 15.

⁴²ICC-01/05-01/08-2827-Conf-Red, para. 12.

⁴³ICC-01/05-01/08-2827-Conf-Red, para. 13.

⁴⁴[REDACTED].

its burden to disclose material relevant to the credibility of the witness or which “may affect the credibility of prosecution evidence”. The Chamber’s Decision reiterated the Appeals Chamber’s position that “the concept of information ‘material to the preparation of the defence’ needs to be interpreted broadly so as to include documents that were not directly linked to exonerating or incriminating evidence”.⁴⁵

42. In this case, the Chamber was explicit that **any information relating to** “outstanding claims” and “money promised by the Prosecutor for witnesses” may be “material to the preparation of the defence”.⁴⁶ As such, material generated during telephone conversations with Witness 169 and Witness 178, and other forms of communication (such as emails or letters) as well as communications with the [REDACTED] concerning these claims for payment is similarly disclosable. The Defence accordingly requests that the Chamber order the disclosure of any correspondence, recordings, statements, or notes of interview generated by the Prosecution during the contact with both Witness 169 and Witness 178, as well as Witness 119, Witness 42, Witness 38, Witness 68 and [REDACTED].

(d) Further investigation into the circumstances of contact and potential collusion between Prosecution witnesses

43. As the Chamber will doubtless appreciate, there are two startling aspects to the material recently disclosed. The first is the apparent revelation that virtually all the [REDACTED] witnesses called by the Prosecution had been promised by and/or were receiving sums of money from the ICC. The second is that, [REDACTED]. Accordingly, the material strongly suggests both a financial interest in testifying on behalf of most, if not all, of the Prosecution’s [REDACTED] witnesses, and collusion between them. In the submission of the Defence, the further investigation of both possibilities is a necessary component of any search for the truth and/or fair trial, as the occurrence of either or both would substantially undermine the credibility of the Prosecution case.

⁴⁵ICC-01/05-01/08-2845-Conf-Red, para. 9, citing Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paras. 77 to 78; ICC-01/04-01/06-1433, para. 77; Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501, para. 38.

⁴⁶ICC-01/05-01/08-2845-Conf-Red, para. 10.

44. The basis for this submission is of course, Witness 169's letter of **7 June 2013**, in which he refers to the [REDACTED] Witness 178 in [REDACTED] to discuss outstanding claims, and then refers to the annex that [REDACTED]. This would not of course be the first evidence of collusion between prosecution witnesses. CAR-OTP-PPPP-0042 testified that [REDACTED]⁴⁷ CAR-OTP-PPPP-0069 testified that [REDACTED] had already appeared before the court.⁴⁸ CAR-OTP-PPPP-0073 was clear that witnesses also came to [REDACTED] as to the dates about which they would testify:

[REDACTED]

45. However, an organised [REDACTED] (possibly the vast majority of) Prosecution [REDACTED] witnesses in [REDACTED] suggests a completely different level of coordination and collusion which would impact on the credibility of all witnesses involved. It would also provide a different and telling context to the rather smaller [REDACTED] already heard of by the Chamber in evidence.

46. As such, the Defence requests the opportunity to investigate and explore the potential collusion between witnesses and the apparent promise of payments to witnesses. The Defence appreciates that this matter has arisen very late in the trial. However, that is not a matter of the Defence's making. As the Chamber has stated throughout this trial and underlined in its most recent decision, such material is unquestionably disclosable. The material in Annexes A and B was in the Prosecution's possession for **4 months** before it sought the Chamber's guidance on the matter. Moreover, it cannot be the case that the Prosecution's knowledge of requests for payments only arose in June 2013.⁴⁹ The Prosecution's attitude to the disclosure of this material heretofore is and was untenable and is the direct cause of the matter arising at this stage of the case.

47. The Defence has no desire unreasonably or unnecessarily to delay the conclusion of the trial. As stated by an ICTY Trial Chamber in *Gotovina*, "[c]oncerns of judicial economy demand that the recalling of a witness should not be granted lightly and only where the

⁴⁷ICC-01/05-01/08-T-65-CONF, p.47.

⁴⁸ICC-01/05-01/08-T-193-CONF, p.25, 43.

⁴⁹ ICC-01/05-01/08-2827-Conf.Red, para 6 Witness 169 was informed of the Registrar's decision concerning loss of earnings in January 2013; the witnesses mentioned at para.13 had "claims pending" in June 2013

evidence is of significant probative value and not cumulative in nature.”⁵⁰ The accused has been in custody now for over 5 years and would wish to see matters finalised. However expeditiousness is not the only component of justice, and important matters such as this cannot simply be swept away as inconveniences because they arise late in the day.

48. On the face of it, [REDACTED] appears on Witness 169’s [REDACTED], stands to be questioned about the receipt of or the request for payments from the ICC, as well as his/her attendance at [REDACTED], and any other forms of [REDACTED] between the witnesses. Whilst not resiling from the submission that the recall of all those witnesses may be justified, the Defence accepts that the investigation of these matters necessitates a degree of judicial economy.

49. To that end, the Defence underlines the importance of the timely disclosure of the information sought in paragraphs 37-43 hereto. That information, put into admissible form for reception into evidence, may well obviate the need for the recall of any witnesses. Nonetheless, the Defence asks that the Chamber at this stage to order the Registry to make arrangements for the recall of Witness 169 and Witness 178 to allow the Defence to question these witnesses under oath about the [REDACTED] between Prosecution witnesses, any collusion between witnesses which may impact the probative value or credibility of their testimony, and promises made or benefits provided by the Prosecution in exchange for their testimony. The information contained in the Prosecution Submissions was not available at the time of the Defence examination of witnesses, nor could it have been discovered through the exercise of reasonable diligence on the part of the Defence.⁵¹ The Defence also notes Chamber’s express acknowledgement that questions of payment and benefits to witnesses are relevant to credibility of the witnesses.⁵²

E. RELIEF REQUESTED

50. On the basis of the above submissions, the Defence respectfully requests that the Chamber:

⁵⁰*Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Prosecution Motion to Recall Mark Rajčić, 24 April 2009, para. 10.

⁵¹ICC-01/05-01/08-1594-Red, para. 25.

⁵²ICC-01/05-01/08-T-277-CONF-ENG-ET, 28-11-2012, pp.35-37.

ORDER the provision of public redacted versions of all filings associated with the conduct of Witnesses 169 and 178;

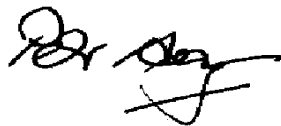
ORDER the Prosecution to provide the Defence with a lesser-redacted version of the Prosecution Submissions in compliance with paragraph 12 of the Chamber's Decision, and to formally disclose and attribute an ERN number to Annexes A and B to the Prosecution's Submissions;

ORDER the disclosure of any requests for payments or other benefits made by Witness 169, Witness 178, [REDACTED]; and all details and dates of the payments or benefits provided to Witness 169, Witness 178, [REDACTED] by the Prosecution, VWU or the Registry, including those made in the period between 25 June 2013 and 3 October 2013;

ORDER the disclosure of any recordings, statements or notes of interviews generated by the Prosecution during the contact with both Witness 169 and Witness 178, as well as Witness 119, Witness 42, Witness 38, Witness 68 and [REDACTED];

ORDER the recall of Witness 169 and Witness 178.

The whole respectfully submitted.



Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

Done this day 24 September 2014
In The Hague, The Netherlands